ATTACHMENT A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Use of Non-Time-Critical Removal Authority in Superfund Response Actions

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TO: Regions I - X
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1. Introduction

Since the inception of the Superfund Accelerated Cleanup Model ("SACM") in 1992, it has been a central feature of EPA's Superfund program philosophy to integrate the removal and remedial programs in order to achieve the greatest human health and environmental protection in the most efficient fashion. To this end, EPA has urged Superfund decision makers to broadly use the CERCLA removal authority to achieve quick, protective results at Superfund sites, consistent with all legal requirements, including public participation. The increased use of removal authority has also been highly effective in increasing the pace of cleanups and has contributed substantially to the number of projects reaching construction completion. Approximately one third of the first 500 projects at NPL sites that have achieved construction completion have had some removal activity. This increased use of removal authority should continue, where appropriate and consistent with the guidelines discussed in this guidance memorandum. Such use allows EPA to take the legally-authorized response actions best suited to the threats posed at sites.

At the same time, the statutory and regulatory differences between the requirements applicable to removal actions and the requirements applicable to remedial actions demonstrate that the distinction between removal actions and remedial actions is important and that there are limitations to the use of removal authority. It is therefore important to continue EPA efforts, in each individual case, to carefully consider and document the bases for employing removal authority.

To ensure that the Regions continue to properly consider and document the rationales for employing removal authorities, this memorandum summarizes the pertinent NCP criteria and guidance to be considered in determining whether the use of remedial or removal authority is most appropriate in a given case. With respect to non-time-critical removal actions, this memorandum provides supplemental guidance regarding the initiation of such actions. This memorandum further clarifies the Headquarters consultation requirement where it is anticipated (at the time the EE/CA Approval Memorandum is prepared and for subsequent, significant increases in project costs) that a non-time-critical removal action could cost in excess of $6 million.[1] This guidance applies to preparation, review, and signature of all EE/CA Approval Memoranda, unless such memorandum has been signed prior to the date of this guidance.

2. Relevant Factors in Selecting Removal Authority

In order for the lead agency to make a determination that a removal action is warranted, the lead agency must first make the determination, preferably in the action memorandum, that there is a release or threat of release into the environment of a hazardous substance, or a release or threat of release into the environment of a pollutant or contaminant which may present an imminent and substantial danger to public health or welfare. CERCLA, 42 U.S.C. 104(a)(1). The lead agency must also make a determination, preferably documented in the action memorandum, that "there is a threat to public health, or welfare or the environment." 40 C.F.R. Section 300.415(b)(1). This determination must be based on a consideration of the appropriateness of a removal action in relation to the factors set out in Section 300.415(b)(2). Id. These factors are:

"(i) Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants;

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[1] While the principles identified in this guidance apply to the use of removal authority by anyone carrying out CERCLA response actions, including other federal agencies, the EPA-HQ consultation requirement identified herein does not apply to actions performed by other federal agencies. Different statutory sections, guidances and agreements may apply to such actions. See, for example, "Policy on Decommissioning Department of Energy Facilities Under CERCLA" (May 22, 1995).

For Brownfields Cleanup Revolving Loan Fund (BCRLF) pilots, existing guidance (e.g., Brownfields Cleanup Revolving Loan Fund Administrative Manual) ensures the appropriate choice of non-time-critical removal authority consistent with this guidance. Regions and BCRLF pilots should continue to follow BCRLF guidance when proceeding with BCRLF funded non-time-critical removal actions.

(ii)Actual or potential contamination of drinking water supplies or sensitive ecosystems;

(iii)Hazardous substances or pollutants or contaminants in drums, barrels, tanks, or other bulk storage containers that may pose a threat of release;

(iv)High levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate;

(v)Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released;

(vi)Threat of fire or explosion;

(vii)The availability of other appropriate federal or state mechanisms to respond to the release; and

(viii)Other situations or factors that may pose threats to public health or welfare or the environment."

40 C.F.R. Section 300.415(b)(2).

In determining the appropriateness of any removal action, the Agency considers the NCP factors set out above and is guided by the partial list of appropriate removal actions set out in 40 C.F.R. Section 300.415(e). The Agency considers the factors set out in 40 C.F.R. Section 300.415(b)(2) as factors that are relevant to determining whether it is appropriate, in a specific circumstance, to employ removal, rather than remedial, authority.

In addition to considering Section 300.415(b)(2) factors, EPA decision makers should also consider the following additional factors in determining whether to employ a non-time-critical removal action or a remedial action in a particular situation: (1) time-sensitivity of the response[2]; (2) the complexity of both the problems to be addressed and the action to be taken; (3) the comprehensiveness of the proposed action[3] and (4) the likely cost of the action[4]. The

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[2] Time sensitivity refers to the need to take relatively prompt action. In contrast, the length of time necessary to complete an action, sometimes referred to as "duration" of the action, captures only how long the response action will take to build or implement. While some courts have looked to that factor in distinguishing between removal and remedial actions, this characteristic usually is not helpful; removal actions are most often of short duration, but they certainly can be long-running responses, too, thereby undercutting the probative value of duration, relative to the factors discussed in the text, in deciding whether an action is removal rather than remedial in nature.

[3] Although some courts have considered the "permanence" of a response action as relevant to discerning whether the action is removal or remedial in nature, the Agency believes that consideration of permanence per se is sometimes misleading in making a determination regarding whether to employ removal or remedial authorities. As a practical matter, removal actions are often permanent solutions such as can be the case in a typical soil or drum removal. Also, the Agency views the reference to "permanent" in the statutory definition of "remedy" as merely reflecting Congress' preference that remedial actions effect permanent solutions. See 42

interplay of these factors, and how varying combinations of them can point toward use of one response authority over the other, are discussed below.

In considering all of these factors, including those supplied by the NCP, regional decision makers often will have to make choices based on information that is far from complete or comprehensive. As they must do in many other situations, regional decision makers must use their professional judgment and make prudent decisions in light of available information. The information which the decision maker considers or relies on in making this determination should be placed in the administrative record.

Generally, where a site presents a relatively time-sensitive, non-complex problem that can and should be addressed relatively inexpensively, EPA would normally address the problem by use of removal authority. But even expensive and complex response actions may be removal action candidates if they are relatively time-sensitive -- regardless of whether any further action might ultimately be selected for a site. Thus, for example, removal authority may be appropriate for incineration of thousands of drums that are degrading over time, especially where the Agency determines as part of an initial removal action that such disposal is warranted regardless of any further action that EPA may ultimately decide is appropriate for a site. Similarly, even technically complex actions may be appropriately implemented under removal authority. For example, dredging large quantities of contaminated sediment could be conducted using removal authority where such action was the appropriate course for abating or controlling a time-sensitive threat.[5]

U.S.C. Section 9621(b)(1). It does not suggest that removals cannot also achieve permanent solutions. Compare 42 U.S.C. Section 9601(23)(definition of "removal") with 42 U.S.C. Section 9601(24)(definition of "remedial action"). However, at sites where the other factors suggest that remedial authority should be used, it may still be appropriate to use removal authority to conduct interim or partial response actions to achieve immediate risk reduction while the RI/FS is completed and the final remedy is selected. This guidance uses the term "comprehensiveness" to distinguish between such interim or partial responses and the final or "comprehensive" response at such sites.

[4] CERCLA Section 104(c)(1) and the NCP at 40 C.F.R. Section 300.415(b)(5) require that fund-financed removal actions (other than Section 104(b) removal actions) be terminated after $2 million has been obligated or 12 months have elapsed unless one of two grounds for a waiver of this limit has been invoked. These limits (which can be waived) apply only to fund-financed actions, and serve as a fiscal check; they are not found in the statutory definition of "removal" and do not control which actions can be taken as removals.

[5] Generally, further examination of the site will also take place in order to determine whether other or subsequent response actions would be appropriate as well.

In contrast, absent time sensitivity[6], remedial authority generally would be used to address complex site problems that will likely require a costly, complicated response. For example, where a response action aimed at aquifer restoration is to be carried out at a complex, highly contaminated groundwater site, where no one is presently using the groundwater, such work will typically call for the use of remedial authority. In addition, remedial authority would generally be used to select a final, comprehensive, costly response to environmental problems at an industrial plant site that includes multiple waste streams or sources of contamination. However, at either type of site, it would remain appropriate to use removal authority to address "hot spots," control the source of contamination, or take other interim actions.

A site-specific decision concerning the use of non-time-critical removal or remedial authority will need to be made based on the NCP criteria and considerations of time sensitivity, complexity, comprehensiveness, and cost. The relative importance of these factors will vary in light of the site conditions and contemplated action in question. Indeed, each decision must be sensitive to site conditions and circumstances. This guidance describes the Agency's general approach to use of non-time-critical response authorities. Guidance cannot anticipate every possible condition or circumstance, and some health or environmental conditions specific to a site may sometimes warrant departure from the approach set out in this section of this guidance memorandum.

3. Documentation Requirements

A. Generally

Existing guidance requires that an action memorandum discuss the threats to public health, welfare or the environment as they relate to the factors set out in Section 300.415(b)(2). See OSWER Dir. 9360.3-01, "Superfund Removal Procedures Action Memorandum Guidance" at 14-16 (Dec. 1990). The underlying information supporting such analysis should also be included in the administrative record for the action. Id. at 2. See also 40 C.F.R. Sections 300.800(a) and 300.810.

Action memoranda should be carefully prepared to effectively document consideration of the factors set out in Section 300.415(b)(2). Where time permits, this discussion in the action memorandum should specifically cite to and identify the underlying data, evaluations, reports or other information on which the discussion is based. Prior to signing an action memorandum, regional decision makers should carefully review the "threats to the environment" section of the action memorandum to ensure that the Section 300.415(b)(2) factors have been considered and documented.

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[6] The issue here is whether a CERCLA decision maker is faced with a threat to human health or the environment that, though not time-critical, is nonetheless sufficiently serious that the added time needed to comply with remedial requirements (e.g., completion of a RI/FS and ROD) would be unacceptable.

B. Non-Time-Critical Removal Actions

Where a planning period of at least six months exists, the NCP establishes important additional requirements for the use of removal authority (principally by requiring that an engineering evaluation/cost analysis or "EE/CA" be prepared and by establishing significant public participation requirements). See 40 C.F.R. Section 300.415(b)(4) and (m)(4).

To authorize the preparation of an EE/CA, existing guidance requires that an EE/CA Approval Memorandum be prepared and approved. See OSWER Dir. 9360.0-32, "Guidance on Conducting Non-Time-Critical Removal Actions Under CERCLA" at 22-23 (August 1993). Importantly, one key function of the EE/CA Approval Memorandum is to document at the beginning of the process that "the situation meets the NCP criteria for initiating a removal action . . . ." Id. The NCP also requires that the lead agency establish an administrative record file for the action at or before the time the EE/CA Approval Memorandum is signed. 40 C.F.R. Section 300.415(n)(4)(I).

To ensure that a non-time-critical removal action is employed appropriately, regional decision makers should ensure that the EE/CA Approval Memorandum:

1) explains the basis for the decision to employ a non-time-critical removal action as opposed to initiating a RI/FS, including a discussion of the factors relevant to that decision, including the relevant Section 300.415(b)(2) factors, and the cost, complexity, comprehensiveness, and time sensitivity of the proposed action, to the extent such information is known or can be reasonably anticipated at the time that the EE/CA Approval Memorandum is being prepared;

2) addresses whether a non-time-critical removal action is appropriate, in the context of any likely response action, including remedial action, that may be selected in the future; and

3) is supported at the time it is signed by an administrative record file that contains all of the underlying information considered by the Region relevant to the findings and key discussion contained in the EE/CA Approval Memorandum, including, but not limited to, a finding of actual or threatened release or discussion that the instant case meets or is likely to meet the NCP criteria and other factors for initiating a removal action.

4. Headquarters Consultation

For non-time-critical removal actions where the cost of the selected removal action could exceed $6 million, the Region must consult with the Director of OERR prior to signing the EE/CA Approval Memorandum (or its equivalent). This consultation requirement applies both to fund-lead actions and those actions to be performed by PRPs. For fund-lead actions, OERR

will coordinate with OSRE to ensure that all enforcement options have been adequately considered. In all cases, the draft EE/CA Approval Memorandum shall be forwarded to the Director of OERR as part of the consultation process.

5. Purpose and Application of this Guidance.

This document provides guidance to EPA staff. This guidance is designed to communicate national policy on use of removal and remedial authority. This document does not, however, substitute for EPA's statutes or regulations, nor is it a regulation itself. Thus, it cannot impose legally-binding requirements on EPA, states, or the regulated community, and may not apply to a particular situation based upon the circumstances. EPA may revise this guidance in the future, as appropriate.